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IN THE

Supreme Court of the United States

OCTOBER TERM 1958

No. 786

ROGER L. ANDERSON, ET AL,

Appellants,

vs.

CITY OF CEDAR RAPIDS, IOWA,

Appellee.

MOTION TO DISMISS APPEAL

APPEAL FROM THE SUPREME COURT
OF THE STATE OF IOWA

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The appellee, City of Cedar Rapids, Iowa, pursuant to Rule 16 moves the court to dismiss the appeal on the ground that it does not present a substantial federal question.

FACTS ON WHICH MOTION IS BASED

This appeal is from a judgment of the Supreme Court of the State of Iowa in which that court held that Section 362.27 of the Iowa Code, which provided for notice by publication once each week for three consecutive weeks in a news-

paper of general circulation in proceedings for the annexation of unincorporated territory which was adjoining a municipal corporation, did not violate the due process requirements of the 14th Amendment to the Constitution of the United States. The opinion of the Supreme Court of Iowa is set forth at Appendix "A" of the statement as to jurisdiction and is now reported in 93 N. W. 2d 216, but is not yet officially reported in the Iowa State Reports.

Section 362.27 of the Iowa Code of 1954, which is challenged by the appellants in the present case, provides for the service by publication once each week for three consecutive weeks in a newspaper of general circulation of a notice which is to be given to the owners of the property proposed to be annexed to a city or town. This Iowa statute relative to notice by publication is only required to be given after the municipal corporation has pursued the various steps prescribed by subsections 1, 2, and 3 of Section 362.26 of the Iowa Code of 1954, which section is set forth at Appendix "B" at page 23 of the statement as to jurisdiction.

In the present case the appellee, City of Cedar Rapids, caused to be published a notice prescribed by subsection 1, of Section 362.26 of the Iowa Code of 1954, advising that the council of the appellee, City of Cedar Rapids, would meet at a certain date to consider a proposed Resolution for the annexation of the territory to the City of Cedar Rapids which is involved in the present appeal, and to hear objections to such proposed annexation. The City Council overruled the objections to such proposed annexation and submitted to the voters of the City of Cedar Rapids the proposition in accordance with subsection 3 of Section 362.26 of the Iowa Code of 1954 as to whether the territory described in the present appeal should be annexed to the City of Cedar Rapids. A majority

of the voters of the City of Cedar Rapids, voting thereon, adopted the proposition to annex the territory here involved. Thereafter, in accordance with subsections 4 and 5 of Section 362.26 of the Iowa Code, the appellee, City of Cedar Rapids, did file with the Clerk of the District Court of Linn County, Iowa, a Petition in Equity which named as defendants some 1500 persons who were shown by the Auditor's Plat Books to be owners of property proposed to be annexed. The appellee, City of Cedar Rapids, served notice by three publications in the Cedar Rapids Gazette of Cedar Rapids, Iowa, which notice named the approximately 1500 owners as parties defendant. In addition to this notice by publication the appellee, in accordance with the requirements of Rule 60.1 of the Iowa Rules of Civil Procedure, mailed by ordinary mail a copy of the published notice to each of the 1500 defendants who were named in the original petition, which notice was addressed to each defendant at his last known address, except an Affidavit was filed which stated that no mailing address was known as to 18 of the persons who were named as defendants in the original action, and that diligent inquiry had been made to ascertain the mailing addresses of such 18 persons.

The provisions of Rule 60.1 of the Iowa Rules of Civil Procedure, which were complied with by the appellee, City of Cedar Rapids, read as follows:

> "RULE 60.1 SAME; KNOWN DEFENDANTS
>
> (a) In every case where service of original notice is made upon a known defendant by publication, copy of the notice shall also be sent by ordinary mail addressed to such defendant at his last known mailing address, unless an affidavit of a party or his attorney is filed stating that no mailing address is known and that diligent inquiry has been made to ascertain it.

(b) Such copy of notice shall be mailed by the party, his agent or attorney not less than twenty days before the date set for appearance.

(c) Proof of such mailing shall be by affidavit, and such affidavit or the affidavit referred to in rule 60.1 (a) shall be filed before the entry of judgment or decree. The court, in its judgment or decree, or prior thereto, shall make a finding that the address to which such copy was directed is the last known mailing address, or that no such address is known, after diligent inquiry. Added 1951."

(See Volume II, Code of Iowa 1954, page 2411).

Thereafter several hundred of the original defendants appeared through their various attorneys and filed pleadings in the pending equity action. Among the issues tendered was that all the owners of property in the territory sought to be annexed, as shown by the Plat Books of the County Auditor, had not been made defendants. A trial was had in the District Court of Linn County, Iowa, on this issue and the court determined after hearing that all owners of property, as shown by the County Auditor's Plat Books, had been made parties defendant except Harvey Booth, Anna Booth, David Booth, John Stodola, S. F. Smudde, otherwise Stanly F. Smudde, Garland J. Waddilove, Iris M. Waddilove, and State of Iowa. (Record in Iowa Supreme Court p. 114, LL 21-27). The trial court ordered these people to be brought in as additional parties defendant and also ordered the plaintiff to bring in as defendants all purchasers of property under contracts of record and assignees thereof as further defendants even though such persons were not shown by the Auditor's Plat Books to be owners of property in the area sought to be annexed.

The appellee, City of Cedar Rapids, endeavored to comply with this ruling of the District Court of Linn County, Iowa,

and filed an Amendment to its Petition in which it named as additional defendants the eight defendants last above named who were shown by the Plat Books of the County Auditor to be owners of property within the area sought to be annexed, and in addition all the persons whom the plaintiff-appellee believed to be purchasers of real estate under contracts of record. The Amendment of Petition contained the names of 537 additional parties as defendants.

The appellants, in the present appeal, are among the 537 additional parties named in the Amendment to Petition. Of the appellants only Harvey Booth, Anna Booth, and David Booth were among the eight persons who were shown by the Auditor's Plat Books to be owner of parcels of real estate within the area proposed to be annexed. None of the other approximately 100 appellants in this appeal were shown by the Auditor's Plat Books to be owners of any of the real estate lying within the area proposed to be annexed.

After this Amendment to Petition was filed naming the 537 additional defendants the appellee, City of Cedar Rapids, published for three consecutive weeks in the manner prescribed by Section 362.27 of the Iowa Code of 1954 another notice. This published notice named each of the 537 additional defendants by name and also was directed to all unknown claimants of the property proposed to be annexed, and informed them that the plaintiff, City of Cedar Rapids, had filed an Amendment to its Petition which prayed that the court decree the annexation to the plaintiff, City of Cedar Rapids, of all the property included within the boundaries as set forth and described in said notice, and notified said defendants to appear before the District Court of Linn County, Iowa, at Cedar Rapids, Iowa, on the 12th day of March, 1958, and unless they did so appear default would be entered against them and decree

would be rendered for the relief demanded in the Petition as Amended.

On March 12, 1958, Roger L. Anderson and 101 other persons, who were named as defendants in the new notice so published, filed a special appearance in the District Court of Linn County, Iowa, in which they asserted:

> "1. That this Court has no jurisdiction to proceed in this case for the following reasons:
>
> "A. That these defendants were not served with sufficient original notice in that the purported original notice was served pursuant to the 1954 Code of Iowa, Sec. 362.27, which requires notice by publication and that said Code Sec. 362.27, is unconstitutional in that it violates the due process requirements of the 14th Amendment of the Constitution of the United States and Art. 1, Sec. 9 of the Constitution of the State of Iowa.
>
> "2. That said purported service of notice is void for all the reasons above-stated.
>
> "WHEREFORE, these defendants ask that said service of notice on these defendants be quashed and the action dismissed."

The District Court of Linn County, Iowa, overruled this special appearance and on April 11, 1958, Roger L. Anderson and the remaining appellants filed a Motion to Dismiss Plaintiff's Petition as Amended, which Motion to Dismiss asserted among other things that the plaintiff had commenced two separate annexation proceedings initially, and thereafter combined these two separate proceedings into one proceeding for the purpose of submitting the same to a vote of the electors in violation of subsections 1 and 2 of Section 362.26 of the Iowa Code of 1954, and asserted other grounds which were

considered by the Supreme Court of Iowa in its opinion rendered on November 18, 1958. This Motion to Dismiss was likewise overruled by the District Court of Linn County, Iowa.

The appellants, Roger L. Anderson et al, thereafter appealed to the Supreme Court of Iowa from the ruling of the District Court of Linn County, Iowa, which overruled their special appearance and held that Section 362.27 of the Code did not violate the due process clause of the 14th Amendment to the Constitution of the United States. They also appealed to the Supreme Court from the rulings of the District Court of Linn County, Iowa, in overruling their Motion to Dismiss on the grounds that the plaintiff, City of Cedar Rapids, had failed to comply with other provisions of Section 362.26 of the Iowa Code relative to annexation. No showing was made in the District Court of Linn County, Iowa, or in the Supreme Court of the State of Iowa by the appellants that the appellee, City of Cedar Rapids, had failed to give notice to the 537 new defendants by ordinary mail as required by Rule 60.1 of the Iowa Rules of Civil Procedure above referred to.

The appellee, City of Cedar Rapids, interpreted the provisions of subsection (c) of Rule 60.1 of the Iowa Rules of Civil Procedure to require proof of such mailing to be made by affidavit before the entry of judgment or decree in the District Court of Linn County, Iowa. Inasmuch as no judgment or decree has ever been rendered in the District Court of Linn County, Iowa, nor has trial been had on the issues which remain for trial under subsection 6 of Section 362.26 of the Iowa Code of 1954, the time has not yet arrived for the plaintiff to make proof of such mailing. However, in the appellants' Brief and Argument filed in the Supreme Court of the State of Iowa they, for the first time, asserted that no notice

of any kind was given to the appellants other than notice by publication. To counter this erroneous contention the appellee, City of Cedar Rapids, filed an application in the District Court of Linn County, Iowa, to correct the record by showing that on August 7, 1958, the plaintiff filed in the office of the Clerk of the District Court of Linn County, Iowa, an Affidavit of one of the attorneys for the plaintiff-appellee, which Affidavit showed that in addition to the notice by publication the appellee, City of Cedar Rapids, also on February 18 and February 19, 1958, caused to be mailed a true copy of the original notice which was published to each of the newly named defendants, which notice was addressed to each defendant at his or her last known mailing address, and was mailed to each of said 537 newly named defendants except the following: Hannie Flaherty, Hanora B. Flaherty, J. M. Kelly, T. R. Kelly, Lois Martin, James Quirk, Alan Richardson, Norma B. Smuddle, and Stanley F. Smuddle, for whom no mailing address was known or could be ascertained although diligent inquiry was made to ascertain such mailing address. (Amendment to Record in Supreme Court of Iowa, p. 4, L. 23 to p. 5, L. 14).

The Supreme Court of Iowa found it unnecessary to decide whether the plaintiff-appellee had complied with Rule 60.1 as to these appellants in the present appeal. The Supreme Court of Iowa held that Section 362.27 of the Iowa Code, which provided for notice by publication, did not violate the due process requirements of the Federal Constitution for the reason that the annexation of unincorporated areas to a municipal corporation without any notice to the owners of the property within the area proposed to be annexed would not constitute a denial of due process. The Iowa court points out that its holding is in harmony with prior decisions of this court which recognize that a property owner has no right in the unaltered or con-

tinued existence of a municipal corporation in which his property is situated and that the territorial limits of a municipal corporation may be extended to include the property of a person without his consent or without notice to him, and over his protest without violating any provisions of the Federal Constitution. The Supreme Court of Iowa further held that even if the doctrine of *Mullane v. Central Hanover Bank & Trust Co.*, 339 U. S. 306, 70 S. Ct. 652, 94 L. Ed. 865, is applicable, adequate notice was given to the appellants so that they were not denied constitutional guarantee of due process in the matter of notice of the filing of the petition in court.

BRIEF IN SUPPORT OF MOTION

No substantial federal question is presented by this appeal for the following reasons:

1. None of the appellants had a vested right to have his property remain outside the territorial boundaries of the City of Cedar Rapids. The Legislature of the State of Iowa had the power to provide statutes for the annexation of territory to a municipal corporation and such statutes have been uniformly upheld even though no notice or hearing is provided to the owners of property within the area proposed to be annexed. The holding of the Iowa court is fully sustained by *Hunter v. City of Pittsburgh*, 207 U. S. 161, 28 S. Ct. 40, 52 L. Ed. 151, from which quotation is made in the opinion of the Iowa Supreme Court.

Since the decision in the Mullane case, supra, this court has dismissed appeals from the decisions of state courts for want of a substantial federal question in cases which have involved the constitutionality of annexation statutes. In *Marsh v. City of El Dorado*, 217 Ark. 838, 233 S. W. 2d 536, the

Supreme Court of the State of Arkansas sustained the constitutionality of an annexation statute of that state. The statute which was there under attack was quite comparable in some of its provisions to the Iowa statute in that it provided for the annexation of adjacent territory upon a vote of the town to which the property was proposed to be annexed. At page 538 of 233 S. W. 2d the Arkansas Supreme Court stated:

> "We hold, therefore, that under the provisions of Section 19-307, above, contiguous territory may be brought into a municipality on the vote of a majority of the electors within the municipality only and that said section is constitutional."

On March 5, 1951, this court rendered a Per Curiam Decision which is found in 340 U. S. 940, 95 L. Ed. 678, 71 S. Ct. 507, where it was held as follows:

> "March 5, 1951. Per Curiam: The appeal is dismissed for the want of a substantial federal question."

More recently the Supreme Court of Texas, in the case of *State v. Texas City*, 303 S. W. 2d 780, sustained the validity of an annexation ordinance enacted by the City of Texas City, which included submerged areas adjacent to the city. The owner of the submerged land asserted that the annexation ordinance was invalid and void and constituted a taking of the relator's property by taxation without due process of law. The Texas court, in sustaining the validity of the annexation ordinance, stated at pages 782 and 783 of 303 S. W. 2d 780, as follows:

> "The constitutional inhibition against taking private property for public use without compensation has reference solely to the exercise of the right of eminent domain

and not to taxation for public use. And although the latter may operate harshly or unjustly this fact affords no power to the court to interfere with the legislative process. Norris v. City of Waco, 57 Tex. 635. In that early case the Court said:

" 'As to this the courts have the power to inquire, for it involves questions judicial in character; but what property shall be embraced within a municipal corporation; and whether the same shall be taxed for municipal purposes, presents questions essentially political, which by the constitution are to be determined by the legislature, and an assumption by the judiciary of power to revise the action of the legislature in such respect would be a usurpation.'

"The matter of the boundaries and extensions thereof and the legislative prerogative in that respect has been delegated by the Legislature to the cities operating under the home rule amendment. The Court went on to hold that, not only can there not be equality of benefits to the individual taxpayers, but some may not receive any benefit at all, except such intangible benefits as may result to them from the preservation of order and protection of property. Surely it cannot be said that, even though petitioners' properties lie wholly within these submerged lands, there would never be an occasion when they would not need to call upon the municipal authorities for police or fire protection and even though they allege that the city has no present intention of furnishing any such services this is not to say that having been incorporated into the city limits they would not be entitled to and could not rightfully demand such protection.

"In Lenox Land Co. v. City of Oakdale, 137 Ky. 484, 125 S. W. 1089, 1091, writ of certiorari dismissed, New Louisville Jockey Club v. City of Oakdale, 231 U. S. 739, 34 S. C. 317, 58 L. Ed. 461, the Court ruled:

" '* * * The extension or reduction of the bound-

> aries of a city or town is held, without exception, to be purely a political matter, entirely within the power of the Legislature of the state to regulate. The established doctrine is that the state Legislature has the unlimited right to pass such laws for the annexation of territory to municipal corporations as in its judgment will best accomplish the desired end, and that a different method may be provided for each class. * * *' "

An appeal was taken to this court and on March 3, 1958, this court rendered a Per Curiam Decision in which the Motion to Dismiss was granted and the appeal was dismissed for want of a substantial federal question. 355 U. S. 603, 2 L. Ed. 523, 78 S. Ct. 533. These recent holdings reaffirmed the rule expressed in *Attorney General ex rel Kies v. Lowrey*, 199 U. S. 233, 50 L. Ed. 167, 26 S. Ct. Rep. 27, where it was held that the Legislature of the state had absolute power to make and change subordinate municipalities. That the Legislature possessed the power to divide counties and towns at its pleasure and to apportion the common property and the common burden in such manner as might seem reasonable. All this could be done without violating the due process clause of the 14th Amendment to the Constitution of the United States.

2. Even if Harvey Booth, Anna Booth, David Booth or any other appellants were able to show that the appellee, City of Cedar Rapids, did not, in fact, mail a copy of the notice to them by ordinary mail they would, nevertheless, have no standing to challenge the validity of the Iowa annexation statutes. Their interests in defeating the annexation of their property to the City of Cedar Rapids is identical with the interests of the more than 1500 people who are also owners of property within the area proposed to be annexed who did receive by mail notice of hearing in the annexation proceedings. Their interests are likewise identical with the several hundred of such

persons who did, in fact, appear in response to the original notice. As a consequence the Iowa court was correct in holding that the present appellants had no standing to question the constitutionality of the Iowa annexation statutes because of the fact that full and adequate notice had been given to many others whose interests were identical to those of the appellants. The holding of the Iowa court is supported by the conclusion expressed in *Mullane v. Central Hanover B. & T. Co.*, 339 U. S. 306, 70 S. Ct. 652, 94 L. Ed. 865, where it was said:

> "The individual interest does not stand alone but is identical with that of a class. The rights of each in the integrity of the fund and the fidelity of the trustee are shared by many other beneficiaries. Therefore notice reasonably certain to reach most of those interested in objecting is likely to safeguard the interests of all since any objection sustained would inure to the benefit of all. We think that under such circumstances reasonable risks that notice might not actually reach every beneficiary are justifiable. 'Now and then an extraordinary case may turn up, but constitutional law like other mortal contrivances has to take some chances, and in the great majority of instances no doubt justice will be done.' Blinn v. Nelson, supra (222 US 7, 56 L ed 68, 32 S Ct 1, Ann Cas 1913B 555)."

In the present case most of those interested in objecting to the annexation proceedings are affirmatively shown to have been served with notice which was in full compliance with the requirements specified by the Mullane decision. Any objections which those so served with notice might make if sustained would fully inure to the benefit of the appellants in this case. Therefore, the Supreme Court of Iowa was correct in its holding that the annexation statute was valid.

3. The boundaries of a municipal corporation and the

means by which such boundaries may be expanded to include other areas is a matter solely of local concern. There is nothing in the Federal Constitution which requires the Legislature of a state to afford any notice or opportunity for hearing to any owner of property within an area proposed to be annexed. The fact, even if it were true, that the appellants' real estate might be subjected to increased taxation, would afford no basis for a claim that any rights under the 14th Amendment to the Federal Constitution were violated. This was the direct holding in *Forsyth v. City of Hammond*, 166 U. S. 506, 518, 17 S. Ct. 665, 41 L. Ed. 1095; *Kelly v. City of Pittsburgh*, 104 U. S. 78, 80-81, 26 L. Ed. 658.

No case is cited by appellants which supports the assertion that property which is classified as rural cannot be reclassified as urban without giving the owner of such property notice and an opportunity for hearing prior to such reclassification. No facts were introduced in evidence which support the assertions of the appellants that the zoning ordinances of the City of Cedar Rapids are more restrictive and burdensome than the county zoning ordinances to which the property is presently subjected. No evidence was introduced in the record which shows the existence of any ordinance of the City of Cedar Rapids which would prohibit the keeping of livestock by the owners of the property proposed to be annexed. There is, in fact, no such ordinance. No evidence was introduced which shows the existence of any ordinance which would force any property owner to abandon a private water or sewer system. No evidence was introduced which shows that any property would be subjected to assessments for street or other improvements except in accordance with the benefits actually conferred as specifically provided by the laws of the State of Iowa. No evidence was introduced that the lands of any ap-

pellant would be subjected to any increased taxation. In fact, under the specific provisions of Section 404.15 of the Iowa Code of 1958 no lands included within the limits of any municipal corporation which are not laid off into lots of ten acres or less shall be liable to taxation for any city or town purpose except not to exceed 1¼ mills in any year for municipal street purposes. See Volume I, Iowa Code 1958, page 1330.

The contentions of the appellants are identical to those held to present no question under the Federal Constitution in Forsyth v. Hammond and Kelly v. Pittsburgh, supra.

CONCLUSION

The appellee, City of Cedar Rapids, asserts that the Supreme Court of Iowa was correct in its conclusion that a failure to provide for any notice and hearing on the question of annexation of territory to a municipality does not deprive owners of their property without due process of law. No substantial federal question is presented by this appeal and the appeal should be dismissed.

Respectfully submitted,

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